

COALINGA CITY SITES
SOUTHERN PACIFIC

SFUND RECORDS CTR

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MAY 17 1990

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
SOUTHERN PACIFIC)
TRANSPORTATION COMPANY AND)
CITY OF COALINGA, CALIFORNIA)
Defendants.)

Civ. #89-1081-EJG/JFM

FIRST AMENDED
CONSENT DECREE

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WHEREAS, the United States, on behalf of the Administrator of the EPA, has filed a complaint in this matter pursuant to the Comprehensive Environmental Response, Compensation, Liability Act, 42 U.S.C. §§9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), ("CERCLA"), seeking to compel the Defendants to perform remedial actions and to reimburse the United States for response costs that have been and will be incurred by the United States in response to releases or threatened releases of hazardous substances at the City of Coalinga Operable Unit Site ("City of Coalinga Site" or "Site"), located at Coalinga, California.

4

1 WHEREAS, on July 19, 1989, the United States issued a Record
2 of Decision ("ROD," attached as Appendix A), which selected a
3 remedy with respect to the City of Coalinga Site.

4 WHEREAS, the Site constitutes a facility as defined in Sec-
5 tion 101(9) of CERCLA, 42 U.S.C. §9601(9).

6 WHEREAS, the Defendants are persons, as defined in Section
7 101(21) of CERCLA, 42 U.S.C. §9601(21) and the Defendants are
8 persons subject to liability under Section 107(a) of CERCLA, 42
9 U.S.C. §9607(a).

10 WHEREAS, the United States asserts that past, present, and
11 potential migrations of hazardous substances constitute actual
12 and threatened "releases," as defined in Section 101(22) of
13 CERCLA, 42 U.S.C. §9601(22), and wastes and constituents thereof
14 produced and disposed of at the Site are "hazardous substances,"
15 as defined in Section 101(14) of CERCLA, 42 U.S.C. §9601(14).

16 WHEREAS, the actions required by this Consent Decree are
17 necessary to protect the public health, welfare, and the environ-
18 ment.

19 WHEREAS, the remedial actions required by this Consent
20 Decree are in accordance with Section 121 of CERCLA, 42 U.S.C.
21 §9621, and with the National Oil and Hazardous Substances Pollu-
22 tion Contingency Plan, 40 C.F.R. Part 300, ("National Contingency
23 Plan" or "NCP").

1 WHEREAS, the United States has notified the State of
2 California in accordance with Section 121(f)(1)(F) of CERCLA, 42
3 U.S.C. §9621(f)(1)(F), and the State of California has concurred
4 in the remedy selection.

5 WHEREAS, the Defendants agree jointly and severally to
6 finance and perform all remedial activities at the Site as
7 provided for in the ROD, and to reimburse the United States for
8 all response costs incurred or to be incurred, except that the
9 City of Coalinga will not be responsible for the continuing
10 Operation and Maintenance responsibilities under this Consent
11 Decree.

12 WHEREAS, pursuant to Sections 106 and 107 of CERCLA, 42
13 U.S.C. §§9606 and 9607, the United States and the Defendants have
14 stipulated and agreed to the making and entry of this Consent
15 Decree prior to the taking of any testimony, based upon the
16 pleadings herein.

17 WHEREAS, the United States and the Defendants agree that the
18 settlement of the matter and entry of this Consent Decree is in
19 good faith, in an effort to avoid expensive and protracted
20 litigation, without any admission as to liability for any pur-
21 pose.

22 I. JURISDICTION

23 (A). The Court has jurisdiction over the parties to and the
24 subject matter of this Consent Decree pursuant to the Comprehen-
25 sive Environmental Response, Compensation, and Liability Act, 42
26

1 U.S.C. §§9601 et seq., as amended by the Superfund Amendments and
2 Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613
3 (1986), ("CERCLA"), federal question jurisdiction, and the status
4 of the United States as Plaintiff. Sections 106, 107 and 113 of
5 CERCLA, 42 U.S.C. §§9606, 9607 and 9613, and 28 U.S.C. §§1331,
6 and 1345.

7 (B). Defendants do not contest and agree not to contest the
8 jurisdiction of the United States to maintain this action or the
9 Court's jurisdiction to enter and enforce this Consent Decree.
10 Defendants also do not contest and agree not to contest that the
11 complaint states a claim upon which relief can be granted. The
12 Defendants waive service of summons of Complaint.

13 II. DEFINITIONS

14 The following definitions shall apply to this Consent
15 Decree:

16 (A.) The City of Coalinga Site ("Site" or "Facility") means
17 the Site of the City of Coalinga Operable Unit defined in the ROD
18 and identified in Figure 1A therein.

19 (B.) CERCLA means the Comprehensive Environmental Response,
20 Compensation and Liability Act, 42 U.S.C. §§9601 et seq., as
21 amended by the Superfund Amendments and Reauthorization Act of
22 1986, Public Law 99-499.

23 (C.) Hazardous Substances shall have the meaning set forth
24 by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
25
26

1 (E.) The National Contingency Plan ("NCP") means the plan
2 promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. §9605,
3 and codified at 40 C.F.R. Part 300, as amended.

4 (F.) OUFS means the Operable Unit/Feasibility Study com-
5 pleted for the Site and dated February, 1989, attached hereto as
6 Appendix C and incorporated herein by reference.

7 (G.) Oversight means the United States' and its contrac-
8 tors' review, inspection, analysis and verification of remedial
9 work and reports of the Defendants as required under the terms of
10 this Consent Decree.

11 (H.) Parties means all parties who are signatories to or
12 who are otherwise bound by this Consent Decree.

13 (I.) Record of Decision ("ROD") means the document, signed
14 by the EPA Region IX Regional Administrator on July 19, 1989,
15 describing the remedy selected by EPA for cleanup of the Site
16 and any subsequent amendments thereto. The ROD is attached as
17 Appendix A and is incorporated as an enforceable part of this
18 Decree.

19 (J.) Release shall be used as that term is defined in Sec-
20 tion 101(22) of CERCLA, 42 U.S.C. §9601(22).

21 (K.) Remedial Action ("RA") means the implementation of the
22 Remedial Design consistent with the NCP and the Superfund
23 Remedial Design and Remedial Action Guidance dated June 1986, in-
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25
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cluding on-site construction, treatment processes, removals, and any other tasks necessary to effectuate the requirements set forth in the ROD.

(L.) Remedial Design ("RD") means all work undertaken to design the technical aspects of the remedial activities to be implemented at the Site.

(M.) Response Costs means all costs, including but not limited to, administrative, enforcement, investigative, oversight, access, removal and remedial costs, incurred by EPA in connection with the response taken by EPA at the Site pursuant to CERCLA.

(N.) Schedule means the schedule which is attached hereto as Appendix B and which is hereby incorporated by reference in this Consent Decree.

(O.) Waste Management Unit ("WMU") means the vault into which the contaminated materials from the Site will be deposited, including its impermeable cap and drainage system.

(P.) Work means the remedial design and remedial action tasks necessary to implement alternative number 5 in the ROD other than Operation and Maintenance.

(Q.) All terms not defined herein shall have the definitions set forth in CERCLA or other applicable statute or regulation. If not defined therein, they shall have their ordinary meaning.

1 Site was divided into four areas: i) The Marmac Warehouse, a
2 structure presently owned by Defendant, Southern Pacific
3 Transportation Company ("SPTC"), and leased by Marmac Resources,
4 Inc., suspected of having been a chromite ore and asbestos dis-
5 tribution center; ii) The Storage Yard, an area containing
6 stacked pipes and piles that were suspected to contain asbestos;
7 iii) The Atlas Shipping Yard, an asbestos distribution center lo-
8 cated at the corner of Sixth Street and Glenn Avenue and other
9 lots located nearby suspected of being former railroad shipping
10 areas for asbestos; and iv) The U.S. Asbestos Company area con-
11 taining mounds of suspected asbestos waste. The land on which
12 these areas are located is currently, or has previously been,
13 owned by Defendant SPTC, Defendant City of Coalinga, and other
14 owners and operators.

15 (C.) In August, 1987, EPA issued Administrative Order #8704
16 pursuant to Section 106 of CERCLA, 42 U.S.C. §9606. Order #8704
17 required SPTC to determine the location and amount of asbestos
18 present on lands presently or previously owned by SPTC in the
19 areas i-iv, as described above, and to fence off the abandoned
20 warehouse area, among other tasks. Results of an intensive sam-
21 pling program showed that the amount of asbestos in the soil in
22 the warehouse areas varies from below the detection limit to 98%
23 asbestos by area in the samples studied. In addition to asbes-
24 tos, the soil was found to contain nickel. SPTC took the follow-
25 ing emergency removal actions, under Order #8704, in the fall of
26

1 1987 and the spring of 1988 to reduce the threat to public health
2 from nickel and asbestos ore that could enter the air from con-
3 taminated soils: i) Areas containing high asbestos levels were
4 fenced; ii) Signs warning of the presence of asbestos were posted
5 around the fenced areas and areas of greater than 1 area percent
6 by PLM; and iii) A temporary biodegradable sealant was sprayed on
7 the asbestos contaminated areas.

8 (D.) The California Regional Water Quality Control Board
9 ("RWQCB") has classified the asbestos waste material at this
10 facility as a Class B mining waste, as defined by Title 23 Chap-
11 ter 3 Subchapter 15 of the California Code of Regulations. EPA
12 has classified asbestos as a "hazardous substance" pursuant to
13 CERCLA and 40 C.F.R. §302.4.

14 IV. PURPOSE

15 (A.) The purpose of this Consent Decree is to serve the
16 public interest by protecting the public health, welfare, and the
17 environment from releases and threatened releases of hazardous
18 substances from the Site by implementation of the ROD.

19 (B.) Completion of the Work shall reduce the levels of as-
20 bestos and nickel ore waste released from the contaminated soils,
21 building structures and equipment to the levels specified in the
22 ROD. The Work shall meet the substantive standards of all
23 "applicable requirements" and "relevant and appropriate require-
24 ments" as set forth in the ROD.

1 (C.) Defendants have agreed to the making and entry of this
2 Consent Decree, pursuant to Section 122 of CERCLA, 42 U.S.C.
3 §9622, prior to the taking of any testimony, based upon the
4 pleadings filed in the case, without any admission of liability
5 or fault. Defendants agree that settlement of this matter and
6 entry of this Consent Decree is made in good faith in an effort
7 to avoid further expense and protracted litigation.

8 **V. BINDING EFFECT**

9 (A.) Each undersigned representative of the parties to
10 the Consent Decree certifies that he or she is fully authorized
11 to enter into the terms and conditions of this Decree and to
12 execute and legally bind such party to this document.

13 (B.) This Consent Decree shall apply to and be binding
14 upon Defendants and Plaintiff, their successors, and assigns.

15 (C.) Defendants agree to provide a copy of this Consent
16 Decree, along with all relevant additions and modifications to
17 this Consent Decree, as appropriate, to each person, including
18 all contractors and subcontractors, retained to perform the Work,
19 within 10 days of entry of this Consent Decree, and shall condi-
20 tion any contract for the Work on compliance with this Consent
21 Decree, provided, that any such contractor shall not thereby be-
22 come subject to any of the penalties set forth herein for noncom-
23 pliance, nor shall any such contractors in any way be deemed a
24 party to this action. Defendants shall also provide a copy of
25 this Consent Decree to all officers responsible for overseeing
26

1 the implementation of this Consent Decree, within 10 days of
2 entry of this Consent Decree, and to any successors and assigns
3 at the time that the relationship of successor or assign is
4 created.

5
6 **VI. WORK TO BE PERFORMED/REMEDIAL ACTION**

7 (A.) Defendants shall, at their own expense, implement and
8 complete the Work for the City of Coalinga Operable Unit accord-
9 ing to the ROD, the Schedule attached hereto as Appendix B and in
10 accordance with EPA oversight and approval as described and
11 provided for in this Consent Decree.

12 (B.) All Work to be performed by Defendants pursuant to
13 this Consent Decree shall be under the direction and supervision
14 of a qualified professional architect, engineer, laboratory or
15 consultant. Prior to the initiation of Work at the Site, Defen-
16 dants shall notify EPA, in writing, of the name, title, and
17 qualifications of any engineer, architect, laboratory or consult-
18 ant proposed to be used in carrying out the Work to be performed
19 pursuant to this Consent Decree. Selection of any such ar-
20 chitect, engineer, laboratory or consultant shall be subject to
21 disapproval by EPA.

22 (C.) Any reports, plans, specifications, schedules, appen-
23 dices, and attachments required by this Decree are, upon approval
24 by EPA, incorporated into this Decree. Any noncompliance with
25 such EPA approved reports, plans, specifications, schedules, ap-
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pendices, or attachments shall be considered a failure to comply with this Decree and shall subject Defendants to stipulated penalties as provided in Section XIV. (Stipulated Penalties) of this Decree.

(D.) As part of the City of Coalinga remedy, Defendants shall complete the following tasks:

(1.) Design and Construction. Defendants shall design and construct the WMU pursuant to the ROD for the City of Coalinga Operable Unit. The contract for construction of the WMU shall be awarded no later than October 16, 1989, unless this Court does not enter this Consent Decree by October 15, 1989, in which case Defendants shall award the contract for construction within 14 days of entry of this Consent Decree, or unless Defendants have been delayed by a condition of force majeure as defined in Section XVI (Force Majeure), or unless a Final Design has not been approved pursuant to Appendix B - Schedule. Defendants shall complete the Work in accordance with the Schedule approved pursuant to paragraph 4 of Appendix B (Schedule).

(2.) Excavation and Removal. Defendants shall excavate the contaminated soil until the clean up levels specified in the ROD are achieved, remove all contaminated materials (as defined in the ROD) to the Waste Management Unit and dispose of the contaminated materials in the WMU pursuant to the ROD for the City of Coalinga Operable Unit.

1 (3.) Conditions on Alienation and Deed Restrictions.

2 Defendants shall comply with all the requirements of Appendix E,
3 which is hereby incorporated by reference into this Consent
4 Decree.

5
6 (E.) Deliverables. Documents submitted and to be submitted:

7 (1.) Monthly Progress Reports:

8 Defendants shall provide written progress reports to EPA on
9 a monthly basis. These progress reports shall describe all ac-
10 tions taken to comply with this Consent Decree, including a
11 general description of activities commenced or completed during
12 the reporting period, work projected to be commenced or completed
13 during the next reporting period, and any problems that have been
14 encountered or are anticipated by Defendants in commencing or
15 completing the work. These progress reports shall be submitted
16 to EPA by the 10th of each month for work done the preceding
17 month and planned for the current month.

18 (2) Verification Sampling Program:

19 (a) Defendants shall comply with the Verifica-
20 tion Sampling Program as outlined in Section 5.0 of the OUFS un-
21 til such time as the Verification Sampling Program is superceded
22 by the Final Verification Sampling Program to be submitted for
23 EPA's review and approval as required in Appendix B - Schedule.

1 (b) Defendants shall, as directed by EPA,
2 comply with all relevant EPA guidance for preparing Sampling and
3 Analysis Plans. See EPA/540/G-89/004, Guidance for Conducting
4 Remedial Investigations and Feasibility Studies Under CERCLA, Oc-
5 tober, 1988.

6 (3) Quality Assurance Program:

7 (a.) Defendants shall comply with the current
8 Quality Assurance Program until such time as the Quality As-
9 surance Program is superceded by the Final Quality Assurance
10 Program to be submitted for EPA's review and approval as required
11 in Appendix B - Schedule. This Final Quality Assurance Program
12 shall contain all conditions necessary to assure that data sub-
13 mitted pursuant to this Decree are of a known quality and shall
14 comply with Documentation Requirements for Data Validation of
15 Non-CLP Laboratory Data for Organic and Inorganic Analyses (U.S.
16 EPA Region IX, May 1988). A copy of the aforementioned publica-
17 tion has been provided to Defendants.

18 (b.) Defendants shall utilize standard EPA sample
19 chain of custody procedures, as documented in National Enforce-
20 ment Investigations Center Policies and Procedures as revised in
21 May 1986 and the National Enforcement Investigations Center
22 Manual for the Evidence Audit published in April 1984, for all
23 sample collection and analysis activities. Copies of the
24 aforementioned publications have been provided to Defendants.

(c.) In order to provide quality assurance and maintain quality control regarding all samples collected pursuant to this Consent Decree, Defendants shall:

(i.) Ensure that all contracts with laboratories utilized by the Defendants for analysis of samples taken pursuant to this Consent Decree provide for access of EPA personnel and EPA authorized representatives to assure the accuracy of laboratory results related to the Site.

(ii.) Ensure that laboratories utilized by the Defendants for analysis of samples taken pursuant to this Consent Decree perform all analyses according to approved EPA methods or other methods deemed in advance to be satisfactory to EPA Region 9. Accepted EPA methods are documented in the Contract Lab Program Statement of Work for Inorganic Analysis. The "Interim Method for Determination of Asbestos in Bulk Samples," EPA 600/M4-82-020, December 1982, shall be used for all asbestos analyses. Copies of the aforementioned publications have been provided to Defendants. The final analytical methodology and reporting requirements shall be discussed and approved by EPA before beginning verification sampling.

(iii.) Ensure that all laboratories utilized by the Defendants for analysis of samples taken pursuant to this Decree participate in an EPA or EPA equivalent QA/QC program. As part of the QA/QC program and upon request by EPA,

1 such laboratories shall perform at Defendants' expense, analyses
2 of samples provided by EPA to demonstrate the quality of each
3 laboratory's data.

4 (iv.) Validate all data in accordance
5 with EPA requirements and the Quality Assurance Program.

6 (4.) Operable Unit Feasibility Study and Conceptual Design.

7 Defendants shall implement the Work in accordance with the con-
8 ceptual design and details in the City of Coalinga OUFS, as
9 modified by the requirements of Appendix D - Description of Cap
10 Design, which is hereby incorporated into this Consent Decree by
11 this reference. The OUFS and conceptual design includes, but is
12 not limited to:

13 (a.) WMU plans and specifications.

14 (b.) compliance with the ARARs
15 as specified in the ROD.

16 (c.) equipment setup and employee and
17 consultant training.

18 (d.) source of cover material for regrading
19 removal areas (asbestos of one percent
20 (1%) or less by PLM analysis).

21 (e.) Site health and safety plan.

22 (f.) verification sampling criteria (asbestos
23 1% or less by PLM analysis).

24 (5.) Prefinal/Final Design. Defendants shall submit a
25 prefinal and final RA design in two parts as follows:
26

1 (a.) the Prefinal Plan shall show 90% comple-
2 tion of the design and include, but not be limited to:

3 (i.) all revisions of and additions to the
4 conceptual design, including those
5 required by Appendix D - Description
6 of Cap Design.

7 (ii.) construction drawings.

8 (iii.) specifications.

9 (iv.) schedules.

10 (v.) cost estimates.

11 (vi.) operation and maintenance plan.

12 (b.) Final Design shall include, but not be
13 limited to:

14 (i.) all revisions of and additions to the
15 90% design.

16 (ii.) final construction drawings.

17 The Final Design shall supercede those portions of the
18 OUFS related to design.

19 (6.) Health and Safety Plan.

20 The Defendants shall submit a Health and Safety
21 Plan pursuant to Appendix B - Schedule. The Health and Safety
22 Plan shall satisfy the requirements of Occupational Safety and
23 Health Guidance for Hazardous Waste Site Activities (October 1985
24 (DHH 5 NIOSH) Publication No. 85-115) and EPA's Standard Operat-
25 ing Safety Guides. The Health and Safety Plan shall address the
26

1 potential exposure of workers at the Site and the public to
2 potential releases at and from the Site during performance of the
3 Work. The Defendants shall implement the Health and Safety Plan
4 after consideration of any comments provided by EPA.

5 (F.) Defendants shall, pursuant to the Schedule in Appendix
6 B, submit a draft and final of each deliverable to EPA.

7 (G.) Any failure of Defendants to submit a deliverable in
8 compliance with the Schedule will be deemed a violation of this
9 Decree subject to stipulated penalties set forth in Section
10 XIV.(Stipulated Penalties).

11 (H.) EPA will, pursuant to the Schedule, review and provide
12 written comments on each draft deliverable submitted by Defen-
13 dants.

14 (I.) Defendants shall, within the time allotted in the
15 Schedule, fully incorporate EPA's comments on the draft into the
16 final and submit the final deliverable.

17 (J.) Any failure of Defendants to fully incorporate into
18 the final deliverable EPA's comments or suggestions on and
19 modifications to the draft deliverable, will be deemed a viola-
20 tion of this Decree, unless such comments suggestions or
21 modifications go beyond the purposes of this Consent Decree as
22 set out in Section IV (Purpose). EPA will provide written notice
23 of such violation, as provided in Section XVII. (Form of Notice).

1 (K.) EPA may determine that additional work, including,
2 without limitation, remedial work, investigations, engineering
3 analysis, and interim response measures are necessary to carry
4 out the purposes of this Decree as set forth in Section IV.
5 (Purpose). EPA shall provide Defendants with written notifica-
6 tion of the additional work required and will state why such ad-
7 ditional work is required. Defendants shall perform the addi-
8 tional work pursuant to EPA oversight and in accordance with the
9 specifications, standards, requirements and schedules determined
10 or approved by EPA.
11

12 VII. PROJECT COORDINATORS

13 (A.) Plaintiff and Defendants shall each designate a
14 Project Coordinator within 10 days after this Consent Decree is
15 lodged. The Project Coordinators shall monitor the progress of
16 the Work and coordinate communication between Plaintiff and
17 Defendants. Designation of the Project Coordinators shall occur
18 as provided in Section XVII. (Form of Notice).

19 (B.) Plaintiff's Project Coordinator will be an EPA
20 employee and shall have the authority vested in the On-Scene
21 Coordinator by 40 C.F.R. § 300 et seq., 50 Fed. Reg. 47912 (Nov.
22 20, 1985), including such authority as may be added by amendments
23 to 40 C.F.R. § 300, as well as the authority to ensure that the
24 Work is performed in accordance with all applicable statutes,
25 regulations, and this Consent Decree.
26

1 (C.) Plaintiff's Project Coordinator will also have the
2 authority to require a cessation of the performance of the
3 Remedial Action or any other activity at the Site that, in the
4 opinion of Plaintiff's Project Coordinator, may present or con-
5 tribute to an imminent and substantial endangerment to public
6 health, welfare, or the environment.

7 (D.) The absence of Plaintiff's Project Coordinator from
8 the Site shall not be cause for stoppage of the Work. The
9 parties may change their respective Project Coordinators by
10 notifying the other party in writing at least seven calendar days
11 prior to the change.

12 (E.) Defendants' Project Coordinator may assign other rep-
13 resentatives, including other contractors, to serve as a Site
14 representative for oversight of performance of daily operations
15 during remedial activities.

16 (F.) Plaintiff's Project Coordinator may assign other rep-
17 resentatives, including other EPA employees or contractors, to
18 serve as a Site representative for oversight of performance of
19 daily operations during remedial activities.

20 (G.) When a site representative other than the Project
21 Coordinator is assigned, notice of this assignment will be
22 provided pursuant to Section XVII. (Form of Notice) within 10
23 days.

VIII. SITE ACCESS

(A.) To the extent that access to or easements over property not owned by Defendants is required for the proper and complete performance of the Work and of this Decree, Defendants shall utilize their best efforts to obtain access agreements from the present owners or those persons who have control within 60 calendar days of the effective date of this Consent Decree. Site access agreements shall provide reasonable access to Defendants, contractor(s), the United States and any of its agencies, the State of California, and their representatives.

(B.) In the event that sufficient site access agreements are not obtained within the 60 day period, Defendants shall notify EPA within 65 calendar days of the effective date of this Consent Decree regarding both the lack of, and efforts to obtain, such agreements. In the event that Defendants are unable to obtain access to any property, Defendants may invoke the terms of Section XVI (Force Majeure) of this Decree.

(C.) During the effective period of this Decree, the United States, the State of California, and their representatives, including contractors, shall have access at all times to the Site and any contiguous property owned or controlled by Defendants.

(D.) Any person obtaining access pursuant to this provision shall comply with all applicable provisions of the Health and Safety Plan submitted by Defendants and reviewed by EPA.

1 IX. SAMPLING AND INVESTIGATION

2 (A.) At the request of Plaintiff's Project Coordinator,
3 Defendants shall provide to Plaintiff split or duplicate samples
4 of any samples taken during the course of the work. Plaintiff
5 shall, pursuant to Section 104 of CERCLA, 42 U.S.C. §9604, have
6 the right to take any samples it deems necessary to complete or
7 monitor progress of the Work.

8 (B.) During the design and construction of the Work, Defen-
9 dant shall notify Plaintiff's Project Coordinator of any planned
10 sampling conducted by Defendants or anyone acting on their behalf
11 in the monthly report submitted prior to the sampling. Such
12 notice will provide at least seventy-two (72) hours notice of
13 planned sampling to Plaintiff. Plaintiff shall be notified in
14 writing thirty (30) days prior to the disposal of any sample
15 taken during the Work, and shall have an opportunity to take pos-
16 session of all or a portion of such sample. Upon expiration of
17 such 30 day period, Defendants shall be free to dispose, in ac-
18 cordance with applicable laws and regulations, of any portion of
19 any sample of which Plaintiff has not taken possession.

20 (C.) Defendants shall permit Plaintiff to inspect and copy
21 all records, documents, photographs and other materials, includ-
22 ing all sampling and monitoring data, that in any way concerns
23 the asbestos or nickel waste problem at the City of Coalinga
24 Site.

(D.) At the request of Defendants, Plaintiff will provide split or duplicate samples collected by Plaintiff and the analytical results obtained from the samples. If Plaintiff collects any samples, or undertakes any other testing work pursuant to the Work, it will notify Defendants' Project Coordinator at least forty-eight (48) hours in advance and permit Defendants to observe the work.

(E.) All information gathered pursuant to this Consent Decree shall be available to the public except as otherwise provided in Section 104(e)(7) of CERCLA, 42 U.S.C. §9604(e)(7).

X. INSURANCE/ASSURANCE OF ABILITY TO COMPLETE WORK

(A.) Defendants or its general contractor shall purchase or otherwise maintain in force a general liability insurance policy in the amount of two million dollars, which shall protect the United States and the public against any and all liability arising out of Defendants' and their contractors and other agents' acts and omissions in performance of the Work at the Site. Prior to commencement of the Work at the Site, Defendants shall provide EPA with a certificate of insurance and a copy of the insurance policy.

(B.) Defendants shall demonstrate its ability to complete the Work by obtaining or providing any of the financial assurance mechanisms permitted pursuant to 40 C.F.R. §264.143. Any such mechanisms shall conform to the substantive requirements set

1 forth in §264.143 and shall use the sum of \$2.5 million in lieu
2 of the closure cost figure set forth in §264.143. At Defendants'
3 choice, and subject to Plaintiff's review as to adequacy, Defen-
4 dants may satisfy its obligations hereunder by providing Plain-
5 tiff with a standard form performance bond issued by a surety
6 company qualified to issue such bonds within the State of
7 California in the above amount. Any financial assurance
8 mechanism provided in this Section shall remain in effect until
9 the Work is accepted by Plaintiff pursuant to Section XXX.
10 (Completion of the Remedial Action).

11 **XI. COMPLIANCE WITH OTHER LAWS AND REGULATIONS**

12 All actions required to be taken pursuant to this Consent
13 Decree shall be undertaken in accordance with the ARARs specified
14 in the ROD and in accordance with CERCLA, as amended, and the
15 NCP, provided, however, that this does not relieve Defendants of
16 their obligation to comply with any applicable laws not
17 referenced in the ROD, other than permitting requirements from
18 which Defendants are excused pursuant to Section 121(e) of
19 CERCLA, 42 U.S.C. §9621(e).

20 **XII. RETENTION OF RECORDS**

21 (A.) Defendants shall preserve and retain all records and
22 documents in their possession or control that relate in any man-
23 ner to the City of Coalinga Operable Unit, regardless of any
24
25
26

1 document retention policy to the contrary, for ten (10) years
2 after the completion of the Work or termination of this Consent
3 Decree, whichever is later.

4 (B.) Until completion of the Work and termination of this
5 Consent Decree, Defendants shall preserve, and shall instruct
6 their contractor, its contractor's subcontractors, and anyone
7 else acting on Defendants' behalf with respect to the Site to
8 preserve (in the form of originals or exact copies, or in the al-
9 ternative, microfiche of all originals) all records, documents
10 and information of whatever kind, nature, or description relating
11 to the performance of the Work for the City of Coalinga Operable
12 Unit. Upon the completion of the Work copies of all such
13 records, documents, and information shall be delivered to
14 Plaintiff's Project Coordinator.

15 **XIII. REIMBURSEMENT OF COSTS**

16 (A.) Within 5 days of the effective date of this Consent
17 Decree, Plaintiff shall submit to Defendants EPA's SPUR or cost
18 summary report and other cost documents deemed appropriate by EPA
19 with respect to Site related response and oversight costs in-
20 curred by Plaintiff to the effective date of the Consent Decree.
21 In addition, at the end of each calendar year, Plaintiff shall
22 submit to Defendants a SPUR or cost summary report with respect
23 to all response and oversight costs incurred by Plaintiff with
24 respect to this Consent Decree. Failure to include all relevant
25 response costs in the submittal at the end of any particular
26

1 calendar year will not preclude Plaintiff from submitting such
2 costs in any subsequent year nor will such failure provide Defen-
3 dants with a reason to refuse payment.

4 (B.) Defendants agrees, within 30 calendar days of receipt
5 EPA's SPUR or cost summary report, to remit a certified check for
6 the amount of those costs and interest made payable to the "EPA-
7 Hazardous Substances Superfund." A copy of each check and trans-
8 mittal letter shall be sent to the Plaintiff's Project Coor-
9 dinator and the Department of Justice.

10 (C.) Checks should specifically reference the identity of
11 the Site and be addressed to:

12 U.S. Environmental Protection Agency
13 Superfund Accounting
14 P.O. Box 371003M
Pittsburgh, PA 15251
Attention: Collection Officer for Superfund

15 (D.) Payment made pursuant to this Section shall not con-
16 stitute an admission by Defendants of any liability to Plaintiff
17 or any other person. Defendants' reimbursement of costs will be
18 limited to such costs which are not inconsistent with the NCP.
19 Defendants shall have the burden of demonstrating that such costs
20 are not consistent with the NCP.

21
22 **XIV. STIPULATED PENALTIES**

23 (A.) Except for any extensions allowed by Plaintiff in
24 writing, or excused by the provisions of the Section XVI. (Force
25 Majeure), for each day in which Defendants fail to submit a
26

1 deliverable in accordance with Appendix B - Schedule, fails to
2 make a payment, or in which Defendants otherwise fail to meet the
3 requirements of this Consent Decree, Defendants agree to pay
4 stipulated penalties as set out in Subsection C. For purposes of
5 this Consent Decree references to days shall mean calendar days
6 unless otherwise specified.

7 (B.) These penalties shall begin to accrue commencing upon
8 Defendant's failure to comply with any term or provision of this
9 Consent Decree, shall continue accruing up to and including the
10 day on which Defendants' noncompliance is corrected, and shall be
11 payable 30 days after Defendants' receipt of Plaintiff's written
12 notice of violation; provided that for inadequate, as opposed to
13 untimely, submittals or for inadequate, as opposed to untimely,
14 performance of the requirements of this Consent Decree, EPA shall
15 provide to Defendants, as soon as possible, oral notification of
16 the occurrence of an event which triggers stipulated penalties,
17 with written confirmation within seven (7) days of the occurrence
18 of that event. If EPA so notifies Defendants within seven (7)
19 days of the inadequate submittals or performance, penalties shall
20 accrue commencing with Defendants' violation, as described above.
21 In the event that EPA fails to so notify Defendants within seven
22 (7) days of inadequate submittals or performance, stipulated
23 penalties shall accrue from the date on which Defendants receive
24 such notice. These notice provisions will not apply to any
25 violation of this Consent Decree which causes a substantial harm
26

1 to health or the environment. Interest shall accrue beginning 31
2 days after Defendants' receipt of Plaintiff's written notice of
3 violation. Interest shall accrue at the rate specified in Sec-
4 tion 107(a) of CERCLA, 42 U.S.C. §9607(a). Nothing in this
5 Decree shall prevent the simultaneous accrual of penalties for
6 each separate violation of this Decree.

7 (C.) Specific Stipulated Penalty Amounts

8 1. Stipulated penalties shall accrue in the following
9 amounts and Defendants may not dispute the amounts set forth
10 below for each class of violations:

11 Class I

12 a. Submittal of the following:

- 13 1. Bid Specifications for all contractors and
14 subcontractors pursuant to 40 C.F.R. Part 61, Subpart M
15 2. Monthly Reports as required herein

16 b. Violation of the following:

- 17 1. Sampling Plan (other than Verification Sampling and
18 Analysis Plan listed in Appendix B - Schedule)
19 2. Clean-up goals (failure to meet)

20 c. All other failures to comply in a timely and adequate manner
21 with the terms of this Consent Decree, including all ARARs iden-
22 tified in the ROD and all requirements of the Schedule and docu-
23 ments approved by EPA pursuant to this Consent Decree, that are
24 not Class II or Class III violations.

25 Penalties:

1 5. Post-closure monitoring requirements

2 c. Award of Contract for Construction as provided in Appendix B
3 - Schedule.

4
5 Penalties:

6 Period of Noncompliance Penalty Per Day Per Violation

7 Days 1 - 5 \$5,000

8 Days 6 - 30 \$12,000

9 After 30 Days \$20,000

10
11 Class IV

12 a. Violation of the following:

13 40 C.F.R. Sections 61.152(b), 61.153(a) and 61.156(a)

14 Penalties:

15 Period of Noncompliance Penalty Per Day Per Violation

16 Days 1 - 5 \$500

17 Days 6 - 30 \$5,000

18 After 30 Days \$20,000

19
20 (D.) Stipulated penalties shall be paid by certified check
21 made payable to the "EPA-Hazardous Substance Superfund" by the
22 15th day of the month following the month in which the violation
23 occurred. Failure to timely pay a stipulated penalty is an addi-
24 tional violation of the Decree, subject to stipulated penalties.
25 A copy of the check and the letter forwarding the check, includ-
26

1 ing a brief description of the violation, shall be submitted to
2 the Plaintiff's Project Coordinator and the Department of Jus-
3 tice.

4 (E.) The stipulated penalties set forth above shall be
5 EPA's sole recourse for penalties against Defendants in this ac-
6 tion unless Defendants fail to pay any penalties demanded by
7 Plaintiff. If Defendants fail to timely pay all of any penalty
8 demanded by Plaintiff, these stipulated penalties will be in ad-
9 dition to any other remedies or sanctions available to Plaintiff
10 for violation of law or this Consent Decree.

11 **XV. DISPUTE RESOLUTION**

12 (A.) If Defendants object to any decision of Plaintiff pur-
13 suant to this Decree, Defendants shall notify Plaintiff's Project
14 Coordinator and the Department of Justice, Chief, Environmental
15 Enforcement Section, P.O. Box 7611, Ben Franklin Station,
16 Washington, D.C. 20044, in writing, within fourteen (14) days of
17 receipt of Plaintiff's decision. Plaintiff and Defendants shall
18 then have fourteen (14) days to informally discuss the respective
19 sides of the dispute. A meeting may be held at Defendants or
20 Plaintiff's request to facilitate resolution of the dispute. At
21 the end of the 14 day discussion period, Plaintiff will issue a
22 written determination of its decision regarding the dispute.

23 (B.) Invocation of the Dispute Resolution procedure itself
24 will not postpone the work schedule with respect to the disputed
25 issue, or stay the accrual of stipulated penalties. Plaintiff
26

1 agrees not to demand payment of penalties accrued until comple-
2 tion of the Dispute Resolution process. The imposition or amount
3 of penalties are not subject to dispute resolution.

4 (C.) If Defendants refuse to implement Plaintiff's deci-
5 sion, Plaintiff may elect to perform the Work. If Plaintiff does
6 perform the Work after Defendants' refusal, stipulated penalties
7 will continue to accrue for the life of the Decree; provided that
8 Defendants may elect to perform the Work in dispute without waiv-
9 ing its right to further contest Plaintiff's decision pursuant to
10 Subsection (D.).

11 (D.) If Defendants refuse to follow the Plaintiff's deci-
12 sion regarding the dispute, Defendants may file with the Court a
13 Motion for Judicial Dispute Resolution briefly describing the
14 dispute and its suggested resolution within 10 days of
15 Plaintiff's written determination.

16 (E.) Plaintiff shall have 45 days to respond to the Motion.

17 (F.) In any judicial dispute resolution proceeding involv-
18 ing matters covered by CERCLA Section 113(j)(2), 42 U.S.C.
19 §9613(j)(2), the Court shall apply the standards and provisions
20 of that statutory subsection. In any dispute relating to the
21 technique, cost, effectiveness or adequacy of any aspect of the
22 Remedial Action or Work, the Court shall apply an arbitrary and
23 capricious standard of review. In any other dispute, and except
24 as specified in Section XVI (Force Majeure), the Court shall
25 determine the appropriate standard of judicial review, based on
26

1 general principals of administrative law. In any dispute, the
2 Defendants shall bear the burden of coming forward with evidence
3 and of persuasion on factual issues.

4 Upon Defendants' filing of a Motion for Judicial Dis-
5 pute Resolution, EPA shall prepare an administrative record of
6 EPA's decision on the disputed matter(s). Defendants shall be
7 responsible for submitting to EPA, during the informal period
8 described in paragraphs (A.) through (C.) above, for inclusion in
9 the administrative record, all information Defendants want EPA to
10 consider before making a decision.

11 The custodian of the administrative record prepared
12 pursuant to the preceding paragraph shall certify and submit the
13 record to the Court upon EPA's filing of its opposition to Defen-
14 dants' Motion for Judicial Dispute Resolution. The Court's
15 review will be limited to this administrative record.

16 (G.) If the Court finds that Plaintiff's decision was ar-
17 bitrary and capricious or otherwise not in accordance with the
18 law (or if the Court has determined that the Plaintiff's decision
19 was not in conformance with this Consent Decree pursuant to
20 another standard of judicial review selected under Subsection
21 (F.)), then the stipulated penalties for the alleged violation
22 shall not be payable. A finding that Plaintiff's decision was
23 arbitrary and capricious or otherwise not in accordance with the
24 law, or otherwise not in accordance with this Consent Decree,
25 shall not excuse stipulated penalties for failure to perform ac-
26

tions not in dispute except to the extent Defendants can show that it was beyond their control, as defined in Section XVI (Force Majeure) of this Decree, to perform those actions pending resolution of the dispute.

(H.) Unless the Court finds that Plaintiff's decision was arbitrary and capricious or otherwise not in accordance with law, or otherwise not in accordance with this Consent Decree, Defendants shall transmit payment of all penalties which have accrued during the dispute, plus interest at the rate specified in 28 U.S.C. § 1961 to the EPA-Hazardous Substance Superfund within 15 working days of resolution of the dispute.

XVI. FORCE MAJEURE

(A.) Defendants shall perform all the requirements of this Consent Decree according to the Schedule and referenced supporting documents or any modification thereto unless their performance is prevented or delayed by events which constitute a force majeure.

(B.) For the purposes of this Decree, a force majeure is defined as any event arising from causes beyond the control of Defendants or their contractors, subcontractors or consultants, which delays or prevents performance. Neither economic hardship nor increased costs shall be considered an event beyond the control of Defendants, and shall not trigger the force majeure clause. Without limiting the foregoing, a Court or Administrative Order enjoining or otherwise preventing Defendants from

1 proceeding with the Work shall be deemed to be a force majeure,
2 provided that such order is not the result of any failure of
3 Defendant to exercise due diligence and due care.

4 (C.) Defendants have the burden of proving by clear and
5 convincing evidence that any delay is or will be caused by events
6 beyond its control and that the duration of the delay requested
7 is necessary.

8 (D.) In the event of a force majeure, the time for perfor-
9 mance of the activity delayed by the force majeure shall be ex-
10 tended for the minimum time necessary to allow completion of the
11 delayed activity, but in no event longer than the time period of
12 the delay attributable to the force majeure. The time for per-
13 formance of any activity dependent on the delayed activity shall
14 be similarly extended. Plaintiff will determine whether require-
15 ments are to be delayed and the time to be granted for any exten-
16 sion. Defendants shall adopt all practicable measures to avoid
17 or minimize any delay caused by a force majeure.

18 (E.) In the event of a force majeure, Defendants shall
19 orally notify Plaintiff's project coordinator immediately (no
20 later than 48 hours after Defendants become aware of the force
21 majeure) and shall notify Plaintiff in writing within seven (7)
22 calendar days after discovery of a force majeure. The written
23 notification shall describe the alleged force majeure, the an-
24 ticipated length of the delay and any measures Defendants are
25 taking to mitigate the event or the delay.

1 (F.) Failure of Defendants to comply with the notification
2 requirements of this Section shall result in automatic forfeiture
3 of any right to claim a force majeure delay, except that if
4 Defendants inadvertently fails to provide Plaintiff with timely
5 notice of an event determined by Plaintiff to be a valid force
6 majeure delay, then penalties for nonperformance of the terms and
7 provisions of the Consent Decree excused by the force majeure
8 will accrue from the day of such violation until the day on which
9 Plaintiff receives written notification of the force majeure as
10 described in paragraph (E.) of this Section.

11 **XVII. FORM OF NOTICE**

12 When notice is required to be given, a report or other sub-
13 mittal is required to be forwarded by one party to another, or
14 service of any papers is necessitated, by the terms of this Con-
15 sent Decree, such correspondence, report or submittal shall be in
16 writing and mailed postage prepaid and addressed as follows:

17 **Plaintiff**

18 Daniel A. Meer (3 copies) (415) 974-7951
19 Laurie J. Williams, Esq. (415) 974-9579
20 U.S. Environmental Protection Agency
Region IX
21 215 Fremont Street
San Francisco, CA 94105

22 Mr. Ruben Moreno (209) 445-5116
23 California Regional Water Quality Control Board
3614 East Ashlan
24 Fresno, CA 93726
25
26

1 Mr. Edward Cargile (916) 920-7708
2 Northern California Section
3 Department of Health Services
4 83 Scripps Drive, Suite 101
5 Sacramento, CA 95825

6 Mr. Tim Casagrande
7 Fresno County Department of Health
8 P.O. Box 11867
9 Fresno, California 93775

10 Mr. John Schroeder
11 Fresno County Air Pollution Control Division
12 1221 Fulton Mall
13 Fresno, CA 93721

14 Defendants

15 All submittals and notifications to Defendants pursuant to this
16 decree shall be made to Defendants' Project Coordinator.

17 In case of written notice or submittals notice shall be
18 deemed given on the date the notification or submittal is
19 received by the party to whom notice must be given pursuant to
20 this Consent Decree.

21 **XVIII. RESERVATIONS AND WAIVERS OF RIGHTS**

22 (A.) Except as provided for in Section XIX (Covenant Not To
23 Sue), Plaintiff reserves the right to take any enforcement action
24 pursuant to CERCLA and/or any other legal authority, including
25 the right to seek injunctive relief, response costs, natural
26 resource damages, monetary penalties, and punitive damages for
any civil or criminal violation of law or this Consent Decree.

1 (B.) Plaintiff reserves the right to disapprove of work
2 performed by Defendants which does not comply with this Consent
3 Decree.

4 (C.) Plaintiff reserves the right to require that Defen-
5 dants perform tasks with respect to this Site, consistent with
6 CERCLA, in addition to those required to perform the ROD, except
7 as otherwise provided in the Section XIX. (Covenant Not To Sue).

8 (D.) Plaintiff reserves its rights pursuant to CERCLA to
9 undertake removal actions and/or remedial actions at any time,
10 except as provided in Section XIX. (Covenant Not To Sue). Plain-
11 tiff reserves the right to recover all costs of those actions not
12 reimbursed by Defendants.

13 (E.) Defendants reserve any defenses or rights it may have
14 with respect to any actions concerning the Site except any rights
15 expressly waived in this Consent Decree.

16 (F.) Defendants waive any right they might have to chal-
17 lenge Plaintiff's or the Court's authority to issue, enter into
18 or enforce this Decree.

19 (G.) Defendants waive any right they might have to seek
20 reimbursement from the Superfund pursuant to the provisions of
21 Sections 106(b)(2) and 112 of CERCLA, 42 U.S.C. §§9606(b)(2) and
22 9612, for any costs incurred by it which are related to the Site.
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1 (H.) Defendants waive any right they might have to initiate
2 a challenge to the imposition or amount of stipulated penalties
3 set out in Section XIV (A-D) of this Decree except as provided in
4 Section XV. (Dispute Resolution).

5 (I.) By entering into and performing this Consent Decree,
6 Defendants do not admit liability for (1) the Site, or (2) any
7 response costs which may have been incurred by any person.

8 (J.) Compliance with the terms of this Consent Decree, in-
9 cluding the completion of the approved work, does not constitute
10 a release of Defendants by Plaintiff from any liability other
11 than as specified in Section XIX. (Covenant Not to Sue).

12 (K.) Defendants reserve any right they may have to file
13 any claim or action with respect to the City of Coalinga Site,
14 including any claim or action for reimbursement, contribution or
15 indemnity for their costs incurred at the Site, except as other-
16 wise expressly waived herein.

17 XIX. COVENANT NOT TO SUE

18 (A.) In consideration of actions which will be performed
19 and payments which will be made by Defendants under this Decree,
20 and except as otherwise specifically provided in this Decree in-
21 cluding specifically as provided in Paragraph C of this Section
22 XIX, the United States covenants not to sue Defendants for any
23 and all claims pertaining to the City of Coalinga Site pursuant
24 to Sections 106 and 107(a) of CERCLA. This Covenant Not To Sue
25
26

1 shall take effect upon certification by EPA of the completion of
2 the Work, pursuant to Section XXX. (Completion of the Remedial
3 Action).

4 (B.) This Covenant Not To Sue does not include:

5 (1.) Liability arising from hazardous substances
6 removed from the facility, except as authorized by
7 Plaintiff pursuant to the ROD;

8 (2.) Criminal liability;

9 (3.) Claims for injunctive relief based on a
10 failure by the Defendants to meet the requirements of this
11 Consent Decree;

12 (4.) Liability for violations of federal law
13 which occur during implementation of the Work, except that
14 if Defendants are liable for stipulated penalties pursuant
15 to this Consent Decree for any violation of CERCLA, Defen-
16 dants shall not be civilly liable to Plaintiff for any other
17 monetary penalty for any such violation of CERCLA;

18 (5.) Liability arising from the past, present, or
19 future release or threat of release of hazardous substances
20 other than at the City of Coalinga Site;

21 (6.) Claims arising from contamination of
22 groundwater resulting from migration of contaminants from
23 the WMU, at and in the vicinity of the City of Coalinga
24 Site;

1 (7.) Claims based on the Defendants' liability
2 arising from the past, present, or future disposal of haz-
3 ardous substances outside of the City of Coalinga Site.

4 (8.) Any claim or demand for damage to federal
5 property located anywhere that the actions contemplated in
6 this Decree are being performed; or

7 (9.) Claims based on liability for damage to
8 natural resources as defined in Section 107(a)(4)(C) of
9 CERCLA, 42 U.S.C. §9607(a)(4)(C).

10 (10.) Claims based on the release or threat of
11 release of hazardous substances from the disposal vault into
12 the environment, provided that the continued undisturbed
13 presence of the substances within the vault without migra-
14 tion shall not be deemed to be a threat of release, except
15 in the event that the circumstances described in paragraphs
16 (C.)(2)(a) or (b) of this Section occur, and indicate that
17 the undisturbed presence of the substances within the vault
18 may be a threat.

19 (11.) Claims based on liability for expenses in-
20 curred in connection with any five (5) year review pursuant
21 to CERCLA Section 121(c);

22 (12.) Claims based on liability for operation
23 and maintenance of the remedy including repairs to the im-
24 permeable cap.

1 (C.) Notwithstanding any other provision of this Consent
2 Decree, the Plaintiff reserves the right to institute proceedings
3 in this action or in a new action (1) seeking to compel Defen-
4 dants to perform additional response work at the site or (2)
5 seeking reimbursement of the Plaintiff's response costs, if:

6 (a.) conditions at the Site, previously un-
7 known to the Plaintiff, are discovered after certification
8 of the remedy; or

9 (b.) information is received, in whole or in
10 part, after certification of the remedy;
11 and these previously unknown conditions indicate or this informa-
12 tion indicates that the Work is not protective of human health
13 and the environment;

14 (D.) This Covenant Not To Sue shall not relieve Defendants
15 of their obligation to meet and maintain compliance with the re-
16 quirements set forth in this Decree, including complete implemen-
17 tation of the ROD, attached as Appendix A.

18 (E.) Nothing in this Consent Decree shall constitute or be
19 construed to constitute a release or a covenant not to sue
20 regarding any claim or cause of action against any person or
21 other entity not a signatory to this Consent Decree for any
22 liability it may have, arising out of or relating to any person
23 or other entity than the Defendants, in connection with the City
24 of Coalinga Site.

(F.) Defendants hereby release and covenant not to sue the United States, including any and all departments, agencies, officers, administrators, and representatives thereof, for any claim, cross-claim, or counter-claim asserted, or that could have been asserted, on or before the effective date of this Consent Decree arising out of or relating to the Site provided that this release shall not cover any claim by Defendants asserted under Section XV. (Dispute Resolution) resulting from a decision or order of Plaintiff's pursuant to this Consent Decree.

(G.) The parties to this Consent Decree agree that the Plaintiff shall be under no obligation to assist the Defendants in any way in defending against suits for contribution brought against the Defendants which allege liability for matters covered by this covenant not to sue by persons or entities that have not entered this settlement

XX. MODIFICATION

There shall be no modification of this Consent Decree without written approval of all parties to this Decree and entry by the Court.

1 **XXI. ADMISSIBILITY OF DATA**

2 In the event that the Court is called upon to resolve a
3 dispute concerning implementation of this Consent Decree, the
4 parties waive any evidentiary objection to the admissibility into
5 evidence of data gathered, generated, or evaluated pursuant to,
6 and in compliance, with this Decree.

7 **XXII. EFFECTIVE DATE**

8 This Consent Decree is effective upon the date of its entry
9 by the Court.

10 **XXIII. COMMUNITY RELATIONS**

11 Defendants shall cooperate with Plaintiff and the State in
12 providing information to the public. As requested by Plaintiff
13 or the State, Defendants shall participate in the preparation of
14 all appropriate information disseminated to the public and in
15 public meetings(s) which may be held or sponsored by Plaintiff or
16 the State to explain activities at or concerning the Site.

17 **XXIV. PUBLIC PARTICIPATION**

18 (A.) Plaintiff will publish notice of the availability for
19 review and comment of this Consent Decree upon its lodging with
20 the United States District Court as a proposed settlement in this
21 matter.

1 (B.) Plaintiff will provide persons who are not parties to
2 the proposed settlement with the opportunity to file written com-
3 ments during a thirty (30) day period following such notice.
4 Plaintiff will file with the Court a copy of any comments
5 received and its responses to such comments.

6 (C.) After the closing of the public comment period, Plain-
7 tiff will review all comments and determine whether the comments
8 disclose facts or considerations which indicate that the proposed
9 judgment is inappropriate, improper or inadequate, and therefore
10 that the Consent Decree should be modified. If a modification is
11 deemed necessary by Plaintiff based on public comment, Plaintiff
12 will notify Defendants.

13
14 **XXV. NOTICE TO THE STATE**

15 Plaintiff has notified the State of California pursuant to
16 the requirements of Section 106(a) of CERCLA, 42 U.S.C. §9606.
17

18 **XXVI. CONSISTENCY WITH THE NCP**

19 Plaintiff and Defendants agree that the Work, if performed
20 in full accordance with the requirements of this Consent Decree,
21 is consistent with the provisions of the NCP, pursuant to Section
22 105 of CERCLA, 42 U.S.C. §9605.
23
24
25
26

1 **XXVII. INDEMNIFICATION OF THE UNITED STATES**

2 Notwithstanding any approvals which may be granted by the
3 United States or other government entities, Defendants agree to
4 indemnify, save, and hold harmless the United States, its offi-
5 cials, employees, agencies, and contractors from any and all
6 claims or causes of action which may arise from the execution of
7 the Work or compliance with this Decree by Defendants and its
8 subcontractors and agents. Defendants also agree to assume any
9 liability arising from or relating to their acts or omissions or
10 the acts or omissions of any of their contractors, subcontract-
11 tors, or any other person acting on their behalf in the perfor-
12 mance or non-performance of the Work.

13
14 **XXVIII. OTHER CLAIMS**

15 (A.) With respect to any person, firm, partnership, or
16 corporation not a signatory to this Decree, nothing in this Con-
17 sent Decree shall constitute or be construed as a covenant not to
18 sue with respect to, or as release from any claim, cause of ac-
19 tion, or demand in law or equity.

20 (B.) This Consent Decree does not constitute a
21 preauthorization of funds under Section 111(a)(2) of CERCLA.

22 (C.) In consideration of entry of this Consent Decree,
23 Defendant agrees not to make any claims pursuant to CERCLA Sec-
24 tions 112 or 106(b)(2), 42 U.S.C. §§9612, 9606(b)(2), or any
25 other provisions of law directly or indirectly against the Haz-
26

ardous Substance Superfund, or make other claims against the United States for costs expended in connection with this Consent Decree.

XXIX. CONTRIBUTION PROTECTION

Pursuant to Section 113(f)(2) of CERCLA, 42 U.S.C. §9613(f)(2), Defendants shall not be liable for claims of contribution regarding matters addressed in this Consent Decree.

XXX. COMPLETION OF THE REMEDIAL ACTION

(A.) EPA shall issue a Certificate of Completion stating that the Remedial Action is complete when EPA has determined that all of the following have occurred: (1) completion of the construction of the WMU, (2) verification sampling demonstrating achievement of the clean up goals specified in the ROD, and (3) recordation of deed restrictions as required by Appendix E.

(B.) If EPA denies certification, Defendants shall either (1) expeditiously complete the work EPA describes as necessary for completion, and submit a new Certification Report, or (2) invoke the Dispute Resolution process of Section XV. (Dispute Resolution) of this Consent Decree. If EPA fails to respond within ninety (90) days of receiving the Remedy Certification Report, then Defendants may invoke the dispute resolution procedure of Section XV.

1 **XXXI. OPERATION AND MAINTENANCE**

2 (A.) Defendant SPTC only shall have the obligation to per-
3 form and maintain the selected remedy to ensure that asbestos and
4 nickel ore wastes are not released into the environment.
5 Monitoring and maintenance of the Site following completion of
6 the construction shall be performed in accordance with the ROD.
7 The ROD requires continuous operation and maintenance of the WMU
8 so as to forever insure that there be no migration of the hazard-
9 ous substances from the WMU.

10 (B.) Defendant SPTC agrees that it shall remain liable for
11 the stipulated penalties provided for in Section XIV. (Stipulated
12 Penalties) for any failure to adequately perform its operation
13 and maintenance responsibilities under this Consent Decree and in
14 accordance with the ROD even following termination of this Decree
15 in as provided in Section XXXIII. (Termination).
16

17 **XXXII. CONTINUING JURISDICTION**

18 This Court specifically retains jurisdiction over both the
19 subject matter of and the Parties to this action for the duration
20 of this Consent Decree for the purposes of issuing such further
21 orders or directions as may be necessary or appropriate to
22 construe, implement, modify, enforce, terminate, or reinstate the
23 terms of this Consent Decree or for any further relief as the
24 interest of justice may require.
25
26

1 **XXXIII. TERMINATION AND SATISFACTION**

2 Upon notice by EPA to the Court that EPA has certified that
3 the Remedial Action is complete and that Defendants have
4 satisfied their obligations under this Consent Decree, this Con-
5 sent Decree shall terminate upon the motion of any party. Ter-
6 mination of this Consent Decree shall not affect the Covenant Not
7 To Sue, including all reservations pertaining to the Covenant,
8 and shall not affect any continuing obligation of Defendant under
9 Section XXXI. (Operation and Maintenance) of this Consent Decree.

10
11 **XXXIV. SECTION HEADINGS**

12 The section headings set forth in this Decree and its Table
13 of Contents are included for convenience of reference only and
14 shall be disregarded in the construction and interpretation of
15 any of the provisions of this Decree.

16
17
18 SIGNED AND ENTERED this 26th day of June, ¹⁹⁹⁰~~1989~~.

19
20
21 
22 UNITED STATES DISTRICT JUDGE

23 By the signatures below, the Parties hereby consent to the
24 foregoing Consent Decree

1 FOR DEFENDANT, SOUTHERN PACIFIC TRANSPORTATION COMPANY:

2 *E.L. Johnson*
3 E.L. JOHNSON
4 Vice President Finance

DATE: September 13, 1989

5 FOR DEFENDANT, CITY OF COALINGA:

6 *Keith Scrivner*
7 KEITH SCRIVNER
8 Mayor

DATE: September 21, 1989

9 FOR PLAINTIFF, UNITED STATES:

10 *Richard B. Stewart*
11 RICHARD B. STEWART
12 Assistant Attorney General
13 Land and Natural Resources
14 U.S. Department of Justice
Washington, D.C. 20044

DATE: 4/25/90

15 *William A. Weinischke*
16 WILLIAM A. WEINISCHKE
17 Attorney, Environmental Enforcement Section,
U.S. Department of Justice

DATE: 4-4-90

18 United States Attorney

19 *Ed Thompson*
20 Assistant United States Attorney

DATE: 5-15-90

21 *Daniel W. McGovern*
22 DANIEL W. MCGOVERN
23 Regional Administrator
24 U.S. Environmental Protection Agency
25 Region IX
26 215 Fremont Street
San Francisco, California 94105

DATE: 2.6.90

APPENDIX B/SCHEDULE

Document or Task

Due Date*

*If a due date would fall on a Saturday, Sunday, or federal holiday, that due date shall be extended until the next federal working day. Regardless of when the Consent Decree is lodged, no deliverable required by this Schedule will be due prior to August 16th, 1989. The Original Consent Decree refers to the Decree lodged with this Court on August 11, 1989.

1. Prefinal and Final Design Plan:

Revised Prefinal Design:.. 7 days after the Original
Consent Decree is lodged

EPA review of Prefinal

Design..... 7 days after receipt of
Prefinal Design

Final Design: 10 days after EPA comments
on Prefinal Design

EPA approval of Final

Design..... 7 days after receipt of
Final Design

Defendants award bid:one day after both of
the following have occurred
(1) EPA approval of the
Final Design and (2) entry
of Original Consent Decree,
except as provided in
Section VI.D.1.

2. Verification Sampling and Analysis Plan:

EPA will provide Defendants with comments on the Verification
Sampling Program and the Quality Assurance Program in the
OUFS by August 2, 1989.

a. Revision of Verification

Sampling Program in OUFS..... One day after lodging
Original Consent Decree

EPA review of revised Verification

Sampling Program..... 7 days after Original
Consent Decree is
lodged

1 Final Verification

2 Sampling Program..... 10 days after receipt

3 of EPA comments on

4 Verification

5 Sampling Program

6 EPA Approval of Final Verification

7 Sampling Program..... 7 days after receipt

8 of Final Verifica-

9 tion Sampling Pro-

10 gram

11

12 b. Quality Assurance Program:

13

14 Revision of Quality Assurance..... One day after

15 Program in OUFS lodging Original

16 Consent Decree

17

18 EPA Review of Revised Quality.....7 days after

19 Assurance Program receipt of Revised

20 Quality Assurance

21 Program

22

23 Final Quality Assurance Program..... 10 days after

24 receipt of EPA

25 Comments

26

EPA Approval of Final Quality 7 days after
Program receipt of Final
Quality Assurance
Program

3. Health and Safety Plan:

Revised Health and Safety Plan.....14 days after
lodging Original
Consent Decree

4. Defendants shall submit a schedule for completion of the construction of the Waste Management Unit at the time of submission of the Final Design. This schedule shall be subject to EPA changes and approval.

1 5. Remedial Action Completion Report..... Upon completion
2 of WMU,
3 verification
4 sampling, and
5 regrading
6 activities

8 EPA Review of Remedial Action Completion Report
9 and (if appropriate) issuance of
10 Certification of Completion of
11 Remedial Action.....Ninety days after
12 receipt of
13 Remedial Action
14 Completion
15 Report

1
2 APPENDIX D

3
4 DESCRIPTION OF FINAL CAP DESIGN

5
6 The Defendants shall construct the WMU with one of the following
7 two conceptual cap designs; the prefinal and final designs will
8 be submitted in accordance with Appendix B. - Schedule.
9

10 I. Elevated Cap With Vegetation: This cap will be at a 2%
11 grade and include the following elements, from bottom to top:
12

13 (1) A two foot foundation layer of compacted clean
14 material that contains less than or equal to one (1) area percent
15 asbestos by PLM.
16

17 (2) A one quarter inch impermeable bentonite mat with a
18 permeability of less than or equal to 10^{-6} centimeters per
19 second.
20

21 (3) A protective soil cover that contains less than or
22 equal to one (1) area percent asbestos by PLM and is least one
23 foot in thickness.
24
25
26

1 (4) A vegetated cover to consist of the following ele-
2 ments (or an engineered equivalent approved by EPA), from bottom
3 to top:

4
5 a) An impermeable synthetic liner.

6
7 b) A "geocomposite" liner to stabilize the drain rock
8 layer.

9 c) A layer of drain rock, adequate to provide
10 drainage for expected precipitation and/or irrigation.

11
12 d) A "geotextile" layer to minimize animal burrowing.

13
14 e) A layer of top soil not less than one foot in
15 thickness with adequate vegetation to prevent erosion.

16
17 II. Grade Level Cap with Natural Vegetation

18
19 In this configuration, the WMU will be completely below grade.
20 The cap will be natural vegetation and include a passive drainage
21 system to provide adequate run off. This passive drainage system
22 will consist of a subsurface layer of drain rock and a subsurface
23 gravel leach field. An impermeable synthetic liner may be re-
24 quired below the layer of drain rock to prevent infiltration of
25 water onto the impermeable bentonite mat.

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3. Any deed, title or other instrument of conveyance regarding the Site shall contain a notice that the Site is subject to this Consent Decree, setting forth the status of the case, the case number, and the Court having jurisdiction herein.